

210944

WSFR[®]

WATSON, STEVENS, FIORILLA & RUTTER, LLP

Attorneys At Law

Representing clients with vigor and integrity.



John K. Fiorilla
JFiorilla@WSFR.net
Michael K. Rutter
MRutter@WSFR.net
Mark Stevens
MStevens@WSFR.net

David P. Brook
DBrook@WSFR.net
Member also NY & PA Bars

Christine A. Roy
CRoy@WSFR.net

Peter J. Fabriele
PFabriele@WSFR.net

Of Counsel

Joseph Stevens

Russell E. Watson (1909-1970)
A. Dudley Watson (1917-1990)
Edward L. Webster, Jr. (1950-1987)

Vernon A. Williams, Office of the Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

FEDERAL EXPRESS


Re: In the Matter of Morristown & Erie Railway Company
Reply to Petition of Five New Jersey Municipalities to Reopen
Finance Docket No. 34054
SUPPLEMENT TO FILED PAPERS OF MORRISTOWN & ERIE RAILWAY

Dear Mr. Williams:

This firm represents the Respondent Morristown & Erie Railway Company of Morristown, New Jersey (M&E"). On January 22, 2004, M&E filed a Reply to a Petition of Five New Jersey Municipalities as cited above. In that Reply M&E enclosed a Certification from the undersigned which included a promise to provide the transcript of a Superior Court of New Jersey Proceeding and Court Opinion discussed in the filing. The transcript of the Proceeding and Opinion dated December 5, 2003 was received from the transcriber here late last week. We are therefore enclosing for filing an original and ten copies of the Proceedings and Opinion with the Board. PLEASE NOTE THAT THE COURT'S OPINION BEGINS ON PAGE 50 OF THE TRANSCRIPT.

Also enclosed is one additional copy to be stamped filed and returned to me in the self-addressed stamped envelope enclosed. Your prompt attention to this matter is kindly appreciated.

Sincerely,


John K. Fiorilla

JKF/ii

Encl.

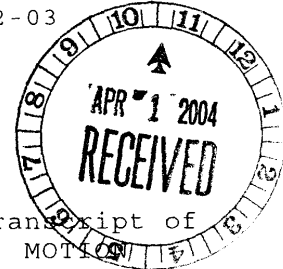
cc: John D. Heffner, Esq. (w/encl.)
Kraig M. Dowd, Esq. (w/enc.)
Scott N. Stone, Esq. (w/encl.)
Jonathan M. Broder, Esq. (w/encl.)
Gordon R. Fuller, COO, M& E Railway- (w/enc.)
Nathan R. Fenno, Esq. (w/encl)

ENTERED
Office of Proceedings

APR 01 2004

Part of
Public Record

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY
DOCKET NO. L-2302-03
A.D. Docket No.



THE BOROUGH OF KENILWORTH,
et al.

Plaintiffs,

v.

THE COUNTY OF UNION and THE
MORRISTOWN AND ERIE RAILWAY, INC.
et al.

Defendants.

Transcript of
MOTION

PLACE: Union County Courthouse
2 Broad Street
Elizabeth, New Jersey, 07207

DATE: December 5, 2003

BEFORE:

HONORABLE EDWARD W. BEGLIN, JR., A.J.S.C.

TRANSCRIPT ORDERED BY:

ALEXANDER W. BOOTH, ESQ. (Brownstein Booth &
Associates, PC)

FREDERICK D. WOLFF, III, C.S.R.
Official Court Reporter
Union County Courthouse
2 Broad Street
Elizabeth, N.J., 07207

APPEARANCES:

HARVEY FRUCHTER, ESQ.
Attorney for Kenilworth.

KATHLEEN ESTABROOK, ESQ.
Appearing for Springfield.

BARRY OSMUN, ESQ.
Appearing for Summit.

JOHN DE MASSI, ESQ.
Appearing for Roselle.

VINCENT LOUGHLIN, ESQ.
Appearing for Roselle Park.

JOHN K. FIORILLA, appearing for the.
-and-

PETER J. FABRIELE, ESQ. (Watson, Stevens,
Fiorilla & Rutter, LLP)
Attorneys for Morristown & Eries Railway,
Inc.

ALEXANDER BOOTH, ESQ. Union County Counsel,
appearing for Union County. His associate.
Kraig Dow, also appearing for Union County.

1 THE COURT: Good afternoon. This is the
2 adjourned return date of the defendants' motion to
3 dismiss the complaint. It would help me before we hear
4 from the defendants if Mr. DeMassi or one of the other
5 representatives from the plaintiffs' side could define
6 for me the causes of action set forth in the amended
7 complaint.

8 Could one of you do that for me?

9 MR. DE MASSI: Actually, Judge, we have
10 agreed Vince will be lead counsel on this matter.

11 THE COURT: Fine.

12 MR. LOUGHLIN: Good afternoon, your Honor.

13 The causes of action in the complaint which
14 has numerous counts, but the principal causes of action
15 are for violation of the Public Contracts Act and the
16 Open Public Meetings Act on the part of the defendant
17 county freeholders. They would be the principal --

18 THE COURT: Now that would be addressed to
19 what freeholder action?

20 MR. LOUGHLIN: Judge, there would be a series
21 and string of actions culminating, of course, in the
22 meeting that has been referred to as, shall we say, the
23 start of the current dispute, the June 5th meeting, and
24 we would have a relation back argument, your Honor,
25 based on the events of June 5th where the freeholders

1 changed their position for the first time and as of
2 that date said now we're going forward to implement
3 this agreement.

4 THE COURT: There was no action at the June
5 meeting regarding the open public, involving the
6 contracts. That is an action that took place a couple
7 years before?

8 MR. LOUGHLIN: There would be relation back,
9 your Honor. There were a series of -- of course we've
10 had no discovery or the benefit of discovery as to what
11 we understand to be a series of meetings both privately
12 with co-defendant railroad and/or with the state D.O.T.
13 and perhaps third-party agencies including the Port
14 Authority of New York and New Jersey. What we intend
15 to show --

16 THE COURT: Whoa. Whoa. You have just said
17 a mouth full that I don't remember reading anything
18 about it.

19 MR. LOUGHLIN: It's not in the briefs, Judge,
20 not in the briefs, not in the complaint. I mention
21 that by way of illustration of relation back since we
22 haven't had discovery, the cause of action would relate
23 back to certain actions that we contend will establish,
24 with the appropriate discovery, were illegally
25 undertaken. We would say what triggers the cause of

1 action would be the June 5th date, which is in our
2 complaint.

3 THE COURT: In terms of Rule 4:69 and the
4 standing argument, did I read anything in the briefs
5 dealing with relation back?

6 MR. LOUGHLIN: As far as the cause of action?

7 THE COURT: That rule has been used in that
8 expansive a fashion.

9 MR. LOUGHLIN: Well, Judge, not as far as
10 relation back to the cause of action. The cause of
11 action exists as of that date when it was announced the
12 freeholders were moving forward with an agreement.

13 Up until that time which, was not fully
14 disclosed, discussed or in effect acted upon by the
15 defendant freeholders, we have not made the relation
16 back argument as far as the pleadings.

17 I react to your Honor as far as what actions
18 are complained of. The action complained of is the
19 June 5th date where the freeholders announced for the
20 first time we're going forward. But the actions
21 complained of, as far as the cause of action which
22 relate to a violation of the Public Contracts Act and
23 the Open Public Meetings Act and some of this
24 information is known to us from press reports and
25 third-party coverage. We intend to prove and believe

1 there will be credible evidence following discovery
2 that will show a series of illegal acts relating back
3 to the dates pleaded by the defendants in this matter
4 which I believe relate to significant events in the
5 year 2000-2001, which they have disclosed in their
6 motion.

7 THE COURT: Okay. Public Contracts Act, Open
8 Public Meetings Act. Any other causes of action?

9 MR. LOUGHLIN: Related causes of action,
10 Judge, public safety, nuisance, those are the
11 primary thrusts because of the actions of the
12 freeholders we have, of course, less vibrations,
13 contract claims and possibility of performance, we have
14 made argument based on the impact of this proposal
15 because of the magnitude of the expenditure and of
16 course the dramatic affect this will have on the
17 citizens of Union County, we have almost a quarter of
18 the municipalities in this County before your Honor in
19 this action pleading to protect their citizenry.
20 Magnitude of the public policy issues that come out of
21 this are also referred to in our pleadings.

22 THE COURT: You haven't used the term
23 prerogative writ. Where does that lie within all of
24 this?

25 MR. LOUGHLIN: The basic cause of action,

1 your Honor, in relationship with the prerogative writ
2 action, it would seem, your Honor, that would be the
3 initial way for the matter to come before the court.
4 Further appropriate pleadings as discovery may require
5 may be required, but it seems that the proper way to
6 commence this proceeding as the municipalities have
7 undertaken is under 4:69-1.

8 THE COURT: Then I asked you what writ are we
9 dealing with?

10 MR. LOUGHLIN: What ultimate writ would be
11 requested?

12 THE COURT: It is in lieu of a prerogative
13 writ. Which writ?

14 MR. LOUGHLIN: We may at the point -- I
15 anticipate that as discovery may go forward, we may be
16 requesting injunctive relief. In particular as would
17 explain --

18 THE COURT: You and I know an injunction is
19 not a writ. This is a particular field of law. What
20 prerogative writ is being utilized in the cause of
21 action?

22 MR. LOUGHLIN: If we were to refer to the old
23 causes of action in Chancery?

24 THE COURT: No, no.

25 MR. LOUGHLIN: I'm puzzled by your Honor's

1 question.

2 THE COURT: Okay. The rule is entitled "In
3 lieu of prerogative writs." There are six in New
4 Jersey jurisprudence. My simple question is which writ
5 or writs are we dealing with?

6 MR. LOUGHLIN: We would, as the old writs
7 were defined, Judge, quo warranto, rule of mandamus and
8 several other causes of action. Again it's a very
9 preliminary stage of this matter. We have had no
10 discovery. But those two immediately would come to
11 mind, your Honor, under 4:69-1.

12 THE COURT: If it's mandamus and bringing on
13 for review an action of the Freeholder Board at the
14 June, 2003, meeting, correct?

15 MR. LOUGHLIN: Yes your Honor.

16 THE COURT: And then seeking through that to
17 relate back to other actions taken at earlier times?

18 MR. LOUGHLIN: Yes, your Honor.

19 THE COURT: And seeking to utilize the
20 relation back exception if there is one?

21 MR. LOUGHLIN: Yes, your Honor.

22 THE COURT: To get over the problem of
23 timing?

24 MR. LOUGHLIN: Well, we've cited in our
25 brief, your Honor, the case law to the effect that ***

1 de juris case. It talks about important public policy
2 questions. Of course, as your Honor is aware, this
3 also is question of estoppel, equitable estoppel and
4 affirmative misrepresentation based on the pleadings
5 and certification that have been submitted including
6 press coverage where representatives of the Freeholder
7 Board, and there has been relation, reference made to
8 meetings, correspondence, direct representations that
9 were supported with certifications and/or pleadings,
10 affirmative assurance was given to the effect that
11 nothing would occur as far as moving forward with
12 implementing this agreement or implementing the rail
13 plan and that's all been pleaded in our complaints and
14 in our certification and in the brief before your
15 Honor.

16 THE COURT: Okay. Anything else within the
17 causes of action?

18 MR. LOUGHLIN: I don't believe so.

19 THE COURT: All right. Thank you, very much.
20 That's all.

21 Who wishes to start?

22 MR. BOOTH: I will start.

23 First, the place we're at now is very
24 preliminary and we have asked you to consider
25 dismissing this complaint without the need for us to

1 file an answer.

2 One of the main questions in here is whether
3 or not you should exercise your discretion to enlarge
4 the time, the 45 day time under prerogative writ. I'd
5 suggest before we get to that, regardless of what you
6 conclude as to your position on that now, there are a
7 number of counts in these complaints which are ripe for
8 dismissal, and I'd first like to address those because,
9 if nothing else, I think we can pare this case down
10 substantially, focus it where it belongs.

11 First of all, there are counts in the
12 complaints seeking to void this agreement based on the
13 lack of a traffic study. Another count for the lack of
14 an environmental impact statement, with no citation as
15 to why there is a duty to provide those documents in
16 this case and frankly, there is none and I think those
17 should be handled now, and I really don't -- hasn't
18 been disputed in the briefs.

19 There's also a reference in several of the
20 complaints to a conflict of interest on the part of an
21 unnamed freeholder or freeholders, and therefore the
22 agreement should be voided. There is no reference to
23 which freeholder. There is no reference to any
24 particular conflict. We raise this in our papers
25 initially. There has been no response, no further

1 specification in the pleadings. On the basis of that,
2 it's a naked allegation, based upon nothing and I think
3 it's totally appropriate for the court now to dismiss
4 that count or those counts in the various complaints.

5 There's also counts in most of the complaints
6 alleging the lack of a failure of consideration in the
7 agreement, operating agreement between M and E and the
8 County.

9 On the face of the agreement, which is part
10 of the record here, there's clearly consideration.
11 Consideration is Horn Book law. Consideration is not a
12 question of somebody getting more benefit or less
13 benefit. It's whether or not something's in there,
14 when you're going to receive a promise and there's no
15 hurdle at all to consideration in that agreement
16 between the parties to it, between M and E and the
17 County. There is a revenue sharing, there's action
18 requiring M and E to rehabilitate and restore the
19 railroad. They're required to take marketing steps.
20 There are a number of requirements and promises made by
21 M and E.

22 There is no issue as to consideration, so why
23 waste your time with that?

24 THE COURT: Do the municipalities have
25 standing to raise that issue?

1 MR. BOOTH: I'm not even dealing with that.
2 They don't have any standing, and that goes to another
3 issue. They say, they raise a question of the
4 possibility of performance and frustration of purpose
5 which we concede can in certain instances excuse
6 performance.

7 The parties to this contract are the County
8 and M and E. If a year or so from now one of us
9 decides that maybe this is impossible, could borrow
10 plaintiff's brief and argue with each other about it
11 and we maybe will prevail, we would be excused from
12 performance. The municipalities aren't being asked to
13 perform anything here, and they're not parties to the
14 contract.

15 So the issue of impossibility is not relevant
16 to this litigation. If anything, that's certainly not
17 and should be cleaned out and swept away again so we
18 can get down to the basics.

19 While I'm on that, I'd like to address the
20 issue of third-party beneficiary. Just because -- Horn
21 Book law again. Just because someone as a third-party
22 may benefit from a contract doesn't give them a right
23 to enforce the contract, nor does it impose upon them a
24 duty to perform. And the issue is, if someone's
25 mentioned in the contract as an incidental beneficiary;

1 the issue is do the real parties to the contract intend
2 to confer a right upon that third-party to enforce the
3 contract? We usually -- if I remember law school many
4 years ago, we used to call them donee beneficiaries or
5 contract beneficiaries, or financial beneficiaries.

6 In this case, we have to go to the document
7 first to seek that out, and the document here talks
8 about a clear intent to restore this railroad. At page
9 seven of the agreement it talks about the specific
10 language that the plaintiffs are relying on, and I'd
11 like to read it.

12 "Within 30 days of the execution of this
13 agreement the County and M & E agree to establish a
14 timetable for public outreach to the communities along
15 the segments of the line identified in phases three and
16 four. The purpose of this outreach is to establish a
17 dialogue with the affected communities and develop the
18 most efficient plan to maximize the benefits of this
19 project to the County and the communities along the
20 line."

21 Now, they're arguing that apparently there
22 was no outreach. Well there is no requirement for
23 outreach. There is a requirement in the contract for
24 there to be a timetable established for some sort of
25 outreach. That timetable could establish outreach two

1 years from now, could establish the outreach, let's
2 say, have an outreach a month before we open up the
3 railroad. Even if we were to say they were third-party
4 beneficiaries, there has been no breach of that
5 agreement and the language in the contract clearly
6 states that the purpose of the outreach is to maximize
7 the benefits of the project. That clearly calls for
8 the railroad to be rehabilitated and reopened. That's
9 the project.

10 So that there is no intent, there is no
11 intent to create rights in these municipalities to
12 enforce this contract or make them parties to the
13 contract, and even if there were, what they're
14 complaining about is no breach. And one last thing, in
15 contract you should consider, there is an article on
16 material breach. It's at pages 14 and 15, and the
17 parties to the contract listed 13 matters that would
18 lead to material proofs that could lead to termination
19 after the opportunity cure. None of those have
20 anything to do with outreach. It is not part of the
21 contract. So as far as the third-party beneficiary
22 claim --

23 THE COURT: Before you leave that, what do I
24 do with the resolution of August, 2002, that recites it
25 was desired to clarify the condition as to that

1 outreach.

2 MR. BOOTH: Judge, that resolution is not, is
3 subsequent to this contract which created rights in M
4 and E and the County. And that resolution spoke to the
5 intent of the Freeholders on the date they passed that
6 resolution. It is not part of the agreement. It's
7 nowhere in there, in the operating agreement with
8 M and E. Nine months, nine or ten months later the
9 Freeholders at the June 5th meeting repealed that
10 resolution by its very language that anything
11 inconsistent herewith, the records, directed that M and
12 E go forth and any prior enactments inconsistent with
13 this are repealed. And so that resolution of August of
14 2002 has been repealed. That was not a contract with
15 anyone. It was a resolution enacted by the Freeholders
16 that is subject to change. It doesn't create permanent
17 rights.

18 I think that -- if I answer the question, I'd
19 segue to the plaintiff's reliance argument. In their
20 brief they reference reliance. Its clear -- I think
21 counsel uses the phrase promissory estoppel. That's
22 what they're talking about there, and I think the
23 Freeholder resolution is a big part of that. I've seen
24 a lot of cases of promissory estoppel. I don't recall
25 anything involving government and call everybody's

1 attention to the front pages of the New York Times. If
2 you're going to rely on government action, if you open
3 up a ***steel bat delivered to the back door. Any way,
4 still, we're supposed to be here until 2005, it's not
5 here any more. It is not a contract, doesn't create
6 contract rights. It's legislation that's subject to
7 change. Can't count on the tax rate staying around
8 forever. So it's not reasonable reliance. But even if
9 they did rely, they haven't alleged any detriment as a
10 result of that reliance.

11 You know, the cases you will see where
12 someone -- I make a promise, without consideration, as
13 a result of that promised good faith you take action,
14 change your position, expend money, and then I say
15 sorry I changed my mind. You try to argue that
16 promissory estoppel. They haven't alleged that. They
17 haven't alleged a detriment. The only detriment they
18 have is that, well, now you're going to have this
19 railroad. Well, that's not, they didn't forebear doing
20 anything. Their reliance didn't cause that. That was
21 going to happen one way or the other. So that the
22 reliance argument is ripe to be dismissed now.

23 There are some other esoteric arguments they
24 make they don't address in their brief. Really should
25 be chucked. I think that would be a reasonable thing.

1 They're arguing that the state didn't approve the
2 county spending funds here. Well, just read the
3 agreement, the use agreement between New Jersey and the
4 County. The State says not only can you do this, but
5 we're going to give you money to do it. And they
6 recognize right in the agreement you're going to use a
7 third-party operator. We anticipate that you will be
8 hiring an operator and paying them money.

9 Obviously, the State Department of
10 Transportation has approved this. So that can go
11 forward, and that operating of the Short-line by
12 operation of a freight line by the county they have
13 said is a legitimate function of county government.
14 Right in the statute they cite, that it is a legitimate
15 function.

16 So I think those counts are ripe to be
17 dismissed regardless of the Statute of Limitation, and
18 they're ripe to be dismissed.

19 One last thing I'd address would be the Open
20 Public Meetings Act. That relates to the June 5, 2003,
21 meeting, and as to that meeting, that's the only
22 meeting in which they're within time, so we don't have
23 an argument then that they're out of time. You don't
24 have relaxation. They're timely. They claim that they
25 were in violation of the Open Public Meetings Act.

1 Initially there was a naked allegation. Subsequently,
2 amended complaints, they in fact stated a claim. There
3 is a claim made out that if it were proven --

4 THE COURT: Now you're shifting beyond the
5 dismissal motion to a summary judgment motion.

6 MR. BOOTH: Yes, because as you well know you
7 have the discretion where there's things outside the
8 complaint themselves have been put in the record and
9 you believe it's appropriate and people have had a
10 chance to put their position in front of you, that you
11 have the discretion to convert some or all or whatever
12 of our motion to dismiss to a summary judgment motion
13 and I think this Open Public Meetings Act issue is very
14 ripe for that and the certification that was submitted
15 to you by Miss Anita MacNamara from the Clerk of the
16 Freeholder's Office, I believe answers the allegation
17 concerning the Open Public Meetings Act.

18 Counsel I'm sure in good faith made their
19 argument and they have stated a claim legally, but
20 factually, there's nothing there, and let me tell you,
21 let me go through the facts they have alleged.

22 THE COURT: Nobody saw the notice posted on
23 the elevator leads to a conclusion.

24 MR. BOOTH: Well, not only was it in the
25 elevator but it was also on the bulletin board.

1 Someone argued that this was not filed with the County
2 Clerk for very good reason. I'm sure someone went over
3 to the County Clerk and couldn't find the notice.

4 THE COURT: They asked the County Clerk and
5 she couldn't find it. She doesn't keep them.

6 MR. BOOTH: They don't keep them. The Clerk
7 of the Board of Freeholder's Office sent the notice to
8 the County Clerk. It was put up, not only in the
9 elevator but on the bulletin board and those are the
10 facts. Why even waste time and money chasing those
11 around.

12 The other argument was the newspapers. There
13 is no 48 hour publication in the Star Ledger. It was
14 published in the Star Leger, was published 24 hours
15 before. That hopefully got to more people to the
16 meeting, but doesn't satisfy the statutory requirement.
17 But there are two other official papers in which there
18 was a 48 hour notice and those have been provided to
19 you by certification.

20 THE COURT: From the Ledger's competitors who
21 published the notice more rapidly than the Ledger?

22 MR. BOOTH: Yes. That tells us something and
23 probably a lot cheaper, too, from what I hear about
24 their rates. But I think that you can and should
25 decide that on summary judgment.

1 If there's another issue on the Open Public
2 Meetings Act, bring it on, but where is it? I will
3 leave the rest unless you have any question for my
4 colleague, Mr. Fiorilla.

5 THE COURT: Public contracts action?

6 MR. BOOTH: I was hoping to leave that to
7 him, Judge.

8 THE COURT: You're the county attorney, he's
9 not.

10 MR. BOOTH: Public contracts action. This is
11 where I would urge that you should consider the 45 day
12 rule. There's no relation back. The latest date that
13 that -- frankly I'd think the controlling date is May
14 9, 2002, when the contract was executed. I believe the
15 case law will show that the time runs from the
16 execution of the public contract. That was May 9,
17 2002, which is approximately 14, 15 months before the
18 action was filed, and we can have argument that really
19 their cause of action accrued in the year 2000, but I'm
20 going, just for sake of argument, to skip all that and
21 go to 2002. They sat on their rights. They sat on
22 their rights because they couldn't care who the
23 operator of the railroad was. Truth of the matter is
24 apparently that the municipalities don't want the
25 railroad and so they didn't bother challenging this,

1 because that wasn't an issue. And so as a result of
2 that late certification which you got from Mr.
3 Fiorilla's office, M and E and the County have been
4 performing under this contract. They haven't been
5 sitting around slumbering and everybody apparently
6 knows that.

7 A lot of money has been spent already by M
8 and E, so that whether or not, if you decide that one
9 of those exceptions applies then you have discretion
10 and a lot of discretion to decide whether or not you
11 should relax the rule.

12 In the exercise of your discretion, I suggest
13 that the case law has created a balancing test, and you
14 have to balance the issue of repose versus the issue,
15 whatever the exception is that you put on the other
16 side of the scale which I guess in this case would be
17 public interest in terms of the Local Public Contracts
18 Law. And there are cases which say that if parties
19 have been operating under the contract, and have
20 changed their position while you're sleeping on your
21 rights, that goes heavy on the scale of maybe I
22 shouldn't exercise my discretion to extend the statute
23 15 or 16 months or whatever it would work out to, and
24 that's -- you see, if you don't feel comfortable
25 deciding right now that this was an E.U.S. based on the

1 former County Counsel's certification, documents that
2 are part of the record, if you read those and you have
3 some hesitancy as to whether or not it is an E.U.S.,
4 then you go to what I just discussed.

5 If you don't have any hesitance to which we
6 argue you shouldn't, then you can just dismiss this
7 now, but if you have some hesitancy, then we ask you to
8 look at the 45 day rule and that's the issue, the 45
9 day rule in my judgment. In the end when everything is
10 done here, that's the key battle ground.

11 THE COURT: Thank you.

12 Mr. Fiorilla?

13 MR. FIORILLA: Yes your Honor.

14 Continuing with counsel's argument, speak
15 about detrimental reliance, our client received a
16 contract, was finally signed in May of 2002. As a
17 result of that contract it had an obligation, if it
18 wanted to proceed, to make application to the Surface
19 Transportation Board and did so in June, 2002.

20 On July 5, 2002, the Surface Transportation
21 Board granted the modified certificate to our clients
22 to begin construction and operation of these rail
23 lines. As a result of that, we have spent \$3.6 million
24 to date doing just that under Phase One, Phase Two, and
25 the other phases as permission given to us by the

1 county under agreement and we are continuing to do that
2 today.

3 I don't know about right this minute because
4 it's snowing, but yesterday, and as far as that's
5 concerned, that is some detrimental reliance clearly to
6 the railroad with regard to whether or not there should
7 be an extension.

8 The railroad does not understand how an
9 action by the county in 2003, if there was any such
10 action, could in any way change the contract without
11 the railroad's consent, agreement or in any other way,
12 and as Mr. Booth stated, those other resolutions were
13 not part of the contract.

14 They weren't binding on the Morristown Erie.
15 The Morristown Erie was going by the contract and by
16 the request of the county pursuant to the contract to
17 continue with the project. They continue to do that.
18 That's one of the reasons we feel that the 45 day rule
19 should not be extended, really greatly extended in this
20 case.

21 There is no question that these
22 municipalities haven't wanted this railroad. When the
23 idea was first brought to light before 2002, probably
24 in the year 2000 or before, and the contract that was
25 signed was approved by the Board of Freeholders at

1 their meeting, they knew all about it, they decided not
2 to object to that contract when it was signed, and when
3 it was promulgated, or take any legal action against
4 it. The railroad relied on that, proceeded with the
5 contract.

6 The other issue --

7 THE COURT: Would they also be chargable with
8 knowledge that the county had received a grant from the
9 Department of Transportation?

10 MR. FIORILLA: I would think they would,
11 Judge. I don't think that was a secret, and in their
12 resolution they talked about that, and in the contract
13 they talk about the fact they were getting a grant for
14 this, and you know, that's always been there.
15 Everybody knew where, what the money was in the
16 contract was going to come from, and there has been
17 money, there has been a grant and the money expended.

18 I think, your Honor, quite frankly, when the
19 railroad really got going is when they started to say
20 gee, we really don't want it to happen now, but that
21 was a year later -- a year later, almost. And that's
22 the situation.

23 THE COURT: When did you start cutting brush,
24 piling up ties and things like that?

25 MR. FIORILLA: I think that was in, it was

1 early -- I believe it was the summer of 2002 when we
2 first started to bring in some of the material and
3 start to cut the brush. We did a lot of the work this
4 summer.

5 THE COURT: Fairly noticeable activity.

6 MR. FIORILLA: Yes, your Honor. And was
7 right pursuant to this agreement. I mean this
8 agreement, by the way, part of the record at the S.T.B.
9 and of course they have it as part of our application
10 and they granted upon it, and said you know you have
11 the right.

12 Now we feel that right -- what they said and
13 how they say it -- is exclusive. They have exclusive
14 jurisdiction of the construction as well as operation
15 of railroads. Pursuant to the Federal regulation, w3e
16 made application to them. They reviewed those, and
17 they granted that certification. According to some of
18 the cases we've cited, what the S.T.B. has decreed, let
19 no court put asunder.

20 I think that when it comes to the operation
21 and construction of railroads, it's that exclusive.

22 It's interesting that plaintiffs talk about
23 the Easterville case, but that case had to do with the
24 Federal Rail Safety Act. Very specific type of
25 situation. Involved grade crossings. Grade crossing

1 is one of the few areas the Federal government gave to
2 the states to handle on a state basis. The reason
3 there was a dispute at all is because the Federal
4 government had its own regulation. Says if you want
5 these millions of dollars we give you, you will use our
6 regulations. Most of the states do. But obviously
7 they have a right not to. It is not exclusive, and
8 that's the situation on Eastern. That's not the
9 situation in our case. Our case is much more like the
10 Village of Ridgefield Park, like Riverdale, like the
11 other cases we cited. Of course, there was exclusive
12 jurisdiction of actual operation and construction of
13 railroad facilities. Plaintiffs obviously have another
14 forum to go to. They can go back to the S.T.B.

15 THE COURT: Do you see plaintiffs having any
16 jurisdiction, any concerns that would be enforceable
17 within the state system as opposed to returning to the
18 S.T.B.?

19 MR. FIORILLA: Not as to operation and
20 construction of the railroad. That's -- those are the
21 claims. You know what they're trying to do with our
22 clients, they're very specific, saying we violated the
23 Open Public Meeting Act and everything else. They're
24 saying there should be some type of injunctive relief
25 to stop us from proceeding with what we're doing and

1 what we're suggesting to the court is that this court
2 has no jurisdiction to do that, and that the S.T.B. has
3 granted the right to do it, and of course you can
4 always apply to the S.T.B. and ask them to change their
5 mind. You can do that. People have done it. The
6 situation is that the exclusive jurisdiction of this
7 type of matter is there.

8 Your Honor, we submitted in our most recent
9 brief that we attached a transcript of Judge Lintner's
10 opinion in a case that was unreported. That case is in
11 the Chancery Division of Middlesex County, 1999. The
12 case we felt was interesting and the reason we did
13 attach it is because in that case the plaintiff in that
14 case was the railroad's landlord or representative of
15 the railroad's landlord, and the railroad has in its
16 particular piece of property a 50 year lease. Of
17 course 23 years had lapsed, and another 23 or so to go.

18 Under that lease, the landlord claimed that
19 pursuant to New Jersey law which the lease is written
20 under, that there was a default and that the railroad
21 could even be evicted or forced to move its operation.
22 Judge Lintner in his opinion in reading the Ridgefield
23 Park case of the New Jersey Supreme Court and reviewing
24 the Interstate Commerce Commission Termination Act in
25 the sections we have cited came to the opinion that

1 there may be a question of New Jersey law here, but the
2 issue of whether the railroad can continue to operate
3 on this property is within the exclusive jurisdiction
4 of the Surface Transportation Board, and that, of
5 course, is in a situation where the right to operate on
6 that property had been granted a long time ago by the
7 Interstate Commerce commission and the question of
8 whether it was necessary now in the public's interest
9 is really exclusively in the S.T.B.

10 That was his reading of the I.C.C.T.A. I
11 leave that to the court to look at that opinion and see
12 if it can follow that agreement as well or agree with
13 it, because we feel that is the law, and that we feel
14 that the Supreme Court of New Jersey would agree with
15 that as to the operation and construction of railroads
16 within any state, not only New Jersey. That is the
17 reason why we have asked that our clients be dismissed
18 from the litigation.

19 THE COURT: None of these municipalities have
20 sought to invoke any health or safety regulation
21 against the railroad that has been denied to them, that
22 could be the subject of an action of this type?

23 MR. FIORILLA: That is right, your Honor,
24 there has been none.

25 THE COURT: Thank you.

.

1 MR. LOUGHLIN: Certain of the municipalities,
2 your Honor, have not had any work performed by the
3 railroad. As far as the efforts of the municipalities
4 to protect their citizenry, with health and safety,
5 those concerns could be addressed as we have cited in
6 our brief in the Ridgefield Park case and C.S.X. case,
7 some concurrent municipal regulation is appropriate.

8 THE COURT: But that's down the road.

9 MR. LOUGHLIN: Down the road, your Honor.
10 We're at a very preliminary stage in this case. Most
11 of the municipalities have not had any work done. No
12 brush clearing. There's some moving around of material
13 at the moment. But most of the municipalities have not
14 had any action taken by the railroad. That can be
15 addressed down the road.

16 To react to the arguments raised by the
17 co-defendant railroad, the Surface Transportation Board
18 has no interest in the state law issues, in the funding
19 and the State law concerns that the municipalities have
20 brought to your Honor. It is obviously incorrect.

21 THE COURT: What are the funding concerns?

22 MR. LOUGHLIN: Whether or not the Freeholders
23 as defendants have properly met, have properly
24 undertaken contracts, have properly expended public
25 funds, and we are impressed with the amount of public

1 funds and duly so that have been spent so far; the
2 financial allocation of this railroad.

3 THE COURT: You're saying, really, the
4 Freeholders or County action that included funding as
5 opposed to some separate funding issue, am I right?

6 MR. LOUGHLIN: The Surface Transportation --

7 THE COURT: Because I just don't understand
8 how I would have any jurisdiction to get into funding
9 issues, generally.

10 MR. LOUGHLIN: Your Honor, the
11 jurisdiction --

12 THE COURT: And if I did, what do I do with
13 preemption because that funding, would it not, would
14 involve operation and maintenance of the line?

15 MR. LOUGHLIN: The preemption issue does not
16 apply. The Surface Transportation Board, we do not
17 claim a cause of action that would regulate the type of
18 tracks, what type of equipment, the operation of a
19 railroad. That's clearly precluded.

20 There have been terms used rather loosely by
21 the defendants in their argument of repose and not
22 taking action before the Surface Transportation Board.
23 The Surface Transportation Board has no interest, no
24 jurisdiction, and would not recognize a complaint were
25 one to be raised, as to a violation of the Public

1 Contracts Act or Open Public Meetings Act in the State
2 of New Jersey.

3 THE COURT: Stay with the Contracts Act. Mr.
4 Fiorilla just advised us that the Board has issued an
5 amended certificate, modified certificate to the line
6 for this purpose.

7 MR. LOUGHLIN: The certificate does not --

8 THE COURT: They would not have done that had
9 the county not taken its action as it did on the Local
10 Public Contracts Act.

11 MR. LOUGHLIN: Different issue, Judge.
12 Term's used rather loosely. Surface Transportation
13 Board does not, and I submit to your Honor I haven't
14 been there and I don't have a transcript of the
15 proceeding, but the Surface Transportation Board is
16 absolutely disinterested in how the railroad would
17 acquire its funding. They're properly concerned with
18 should the lines be reactivated.

19 THE COURT: You're shifting. Stay with the
20 contract. The Board has taken some action pursuant to
21 the award of the contract to this railroad. It's
22 modified, and jurisdictional certification, so to that
23 extent, is it not now interrelated? Don't we begin to
24 spill over into Federal land?

25 MR. LOUGHLIN: No, we do not, your Honor.

1 Federal issues are separate and distinct. No
2 preemption. The funding issue is irrelevant to their
3 certificate to operate. They have the authority to
4 operate and it's a rather pro forma ministerial
5 process, as I understand it, where they go forward and
6 say we submit that we would like to reactivate this
7 line. There is a strong Federal preference for
8 reactivation of rail lines.

9 Issues about what happens as far as funding,
10 whether it's the Union County Board of Freeholders or
11 Chase Manhattan Bank do not enter into their
12 determination. They do not have the jurisdiction to
13 preclude the inquiry of this court, otherwise, your
14 Honor, there would be wrongs without remedy which could
15 not exist. The Surface Transportation Board does not
16 address itself to whether the Union County Board of
17 Freeholders have acted lawfully under our state law in
18 deciding to fund a project.

19 We submit in our papers that the actions have
20 been improper and unless your Honor were to intervene,
21 for example the initial expenditures anticipated for
22 the rehabilitation of this line is \$7.5 million. We
23 believe to be substantially exhaustive. We believe it
24 will take many, many more millions of dollars for this
25 project to come to fruition.

1 THE COURT: Why need that concern me?

2 MR. LOUGHLIN: It concerns you, your Honor
3 because this is the only forum. These are state
4 issues, whether or not the Board of Freeholders has
5 properly acted in permitting funds, public funds,
6 pursuant to our Public Contracts Law and pursuant to
7 our Open Public Meetings Act requirements. That is the
8 concern. That has nothing to do with the federal
9 inquiry, has nothing to do so with federal
10 jurisdiction, the Surface Transportation Board were we
11 to fly down there tomorrow would not take any interest
12 in that whatsoever because it's not their function.

13 THE COURT: When did the Freeholder Board
14 take action as to public funding?

15 MR. LOUGHLIN: To publicly fund it?

16 THE COURT: Funding, when did that do that?

17 MR. LOUGHLIN: We're still, Judge, trying to
18 figure out disbursements.

19 THE COURT: Wait a minute. When did they
20 take action? When did the Freeholder Board take action
21 dealing with public funding? Wasn't it in June of '03?

22 MR. LOUGHLIN: We believe, Judge, based on
23 information we have been able to obtain from the New
24 Jersey Department of Transportation that funding was
25 committed substantially before that date, and at

1 different times. The railroad mentioned they spent
2 three point some odd million dollars. We believe the
3 amount spent on this project to date --

4 THE COURT: I stand corrected. I stand
5 corrected. Attached to the June '03 resolution is a
6 separate resolution, is there not, adding a revenue
7 line to the county budget for this fiscal year?

8 MR. LOUGHLIN: At this point --

9 THE COURT: Where in your complaint are you
10 challenging that?

11 MR. LOUGHLIN: That particular expenditure,
12 Judge?

13 THE COURT: The governmental action, the
14 County amending the revenue line of this year's budget.
15 I don't read any challenge to that government act in
16 your complaint.

17 MR. LOUGHLIN: That specific act, your Honor,
18 would be subject to the complaint, and the cause of
19 action that it relates to a continued pattern of
20 illegal activity on the part of the county. Again
21 understand --

22 THE COURT: Now we're relating back and relating
23 forward?

24 MR. LOUGHLIN: Judge, we're in a stage right
25 now where we are reacting to a motion to dismiss prior

1 to answer. The defendants are claiming the
2 extraordinary right to dismiss.

3 THE COURT: And I'm trying to read your
4 pleading expansively, as I must on this motion.

5 MR. LOUGHLIN: Judge, I think --

6 THE COURT: And I'm suggesting to you even if
7 I do that, I can't find in that pleading any challenge
8 to the action as to the revenue side, fiscal '03
9 budget. If I'm wrong, then you or your colleagues can
10 point that out.

11 MR. LOUGHLIN: I think at this point, your
12 Honor --

13 THE COURT: I suggest maybe that's too
14 expansive.

15 MR. LOUGHLIN: I'd submit to your Honor at
16 this stage, in fairness to the plaintiff
17 municipalities, we are obtaining information in dribs
18 and drabs. We do not have formal discovery rights as a
19 result of the motion that has been filed. I submit to
20 your Honor it would be premature to address that.

21 THE COURT: Sir, I know that, but let's be
22 very frank. It is December, the last month in the
23 fiscal year. And if the county is not yet on notice,
24 that a significant amount on the revenue side of this
25 year's budget is under challenge, the county only has

1 three and a half weeks to go before the books close.

2 MR. LOUGHLIN: I'm not following your Honor's
3 question.

4 THE COURT: If you're challenging the
5 separate resolution of the Freeholder Board in June
6 '03, accepting the State monies and adding them to the
7 revenue side of the county budget, don't you think the
8 county needs to know that is being challenged before
9 the end of December?

10 MR. LOUGHLIN: They clearly have that notice,
11 Judge. They clearly have the notice of the date of
12 filing of the complaint and service,

13 THE COURT: That's the question, where do I
14 find it in this complaint, that that act, not the
15 separate resolution dealing with the public input, but
16 that act is now being brought under challenge?

17 MR. LOUGHLIN: And further acts may be
18 brought under challenge as discovery may indicate,
19 Judge, when we have the opportunity to get into it,
20 because it's our belief and we have so pleaded, that
21 not only has the Public Contracts Act been violated,
22 but also that the underlying agreement which described
23 certain funding levels of performance will be in fact
24 impossible for realization, and that condition or
25 status is already known by both defendants in this

1 case.

2 So additional allegations will come forth
3 quite properly so as the matter continues in discovery
4 where we have access to Freeholder records, when we
5 have access to vendor vouchers, when we have access to
6 lists of expenditures, presently unknown to us, Judge.

7 These defendants are saying, and they have
8 used some terms today to segregate out counts of the
9 complaint based upon Factual arguments. When we came
10 into this case, into the court before your Honor, the
11 defendants said we can have this matter, your Honor
12 properly dismissed on two grounds, one it's a Federal
13 issue, should never be addressed by this court, or two
14 it's untimely. I submit to your Honor we have
15 submitted case authority in this state and appropriate
16 certifications and information available to date that
17 show your Honor overwhelmingly that the magnitude of
18 the funds and public impact and public interest that's
19 involved in this matter should require at the least
20 opportunity to the municipalities to develop those
21 proofs and evidence that have been withheld from them,
22 withheld from them and will never be addressed. This
23 project has the potential, your Honor, as I submitted,
24 to go for many, many millions of dollars beyond what's
25 already been committed and that that process and that

1 the particular abuse of our state law will continue
2 without your Honor's active involvement in this case to
3 allow the plaintiff municipalities to go forward to
4 develop their cases.

5 THE COURT: What type of active involvement
6 do you have in mind? That's why I asked you about the
7 cause of action initially.

8 MR. LOUGHLIN: To allow the matter, your
9 Honor, to survive a motion to dismiss, in the nature
10 of, as presented to your Honor, a motion to dismiss for
11 failure to state a claim.

12 I submit to your Honor we have overwhelmingly
13 stated a claim. I submit to your Honor that the public
14 policy issues and state law issues involved in this
15 matter are overwhelming and substantial, and that in
16 the interest of justice and based upon that strong
17 showing, that the matter should be allowed to get over
18 the threshold motion filed by these defendants to
19 dismiss and to preclude the light of day from shining
20 on those issues.

21 THE COURT: Do you wish to respond to the
22 information provided as to the Open Public Meetings Act
23 compliance?

24 MR. LOUGHLIN: Your Honor that's only come in
25 in the last several days, similar to the certification

1 that was submitted by the railroad as to their recent
2 claim of expenditures in reliance.

3 THE COURT: Sir, I have a certification from
4 a public official that notices were posted and served
5 as required by statute. I have proof of publication in
6 two newspapers of general circulation within the
7 requisite 48 hour period. What are you going to
8 challenge as to the Open Public Meetings Act?

9 MR. LOUGHLIN: As far as that particular act,
10 your Honor?

11 THE COURT: What else is there?

12 MR. LOUGHLIN: That particular act, Judge,
13 the certification recites that one of the newspapers, I
14 think it was the Star Ledger was --

15 THE COURT: No, I said two before, I didn't
16 count the Ledger.

17 MR. LOUGHLIN: We would like the opportunity,
18 your Honor, to explore that.

19 THE COURT: What are you going to explore?
20 You have a certification from two newspapers that they
21 published it.

22 MR. LOUGHLIN: We would like, your Honor, an
23 opportunity to explore.

24 THE COURT: Do you need 35 cents to go buy a
25 newspaper and look and see if it was in there. What

1 are you going to explore?

2 MR. LOUGHLIN: We need to explore written
3 notice.

4 THE COURT: You have a certification from the
5 county official that they were posited on the board
6 outside the meeting room of the Freeholders and a copy
7 was sent to the County Clerk.

8 MR. LOUGHLIN: We have information, Judge,
9 that notice was placed in the freight elevator.

10 THE COURT: Doesn't matter. You've got a
11 certification it was posted on a bulletin board where
12 such notices are posted.

13 MR. LOUGHLIN: We would like an opportunity,
14 your Honor, to explore that certification.

15 THE COURT: What are you going to explore,
16 depose the lady who said she posted it?

17 MR. LOUGHLIN: We would like an opportunity
18 to explore that issue.

19 THE COURT: Then what?

20 MR. LOUGHLIN: As part our case, Judge.

21 THE COURT: I don't understand where you're
22 going with that.

23 MR. LOUGHLIN: Judge, that's only an indirect
24 and very minor part of this complaint, of the overall
25 claim. We would like an opportunity to explore that.

1 It's just come in. We haven't seen it before.

2 THE COURT: What relief do you get if it
3 turns out the lady didn't post the notice? What
4 relief?

5 MR. LOUGHLIN: As far as June 5th?

6 THE COURT: Under the Open Public Meetings
7 Act, what relief are you entitled to?

8 MR. LOUGHLIN: For the June 5th meeting?

9 THE COURT: Yes.

10 MR. LOUGHLIN: I'm not sure I can answer that
11 today.

12 THE COURT: Doesn't the statute say I can
13 void that action?

14 MR. LOUGHLIN: On the June 5th meeting, yes,
15 your Honor.

16 THE COURT: So I void that resolution. Where
17 does that get you? What have you accomplished?

18 MR. LOUGHLIN: Underlying cause of action
19 continues. That part of the complaint, that count may
20 fail, Judge, but that is not fatal to the cause of
21 action.

22 THE COURT: It's dependent on relation back.

23 MR. LOUGHLIN: Yes, your Honor.

24 THE COURT: Okay. Now what about the Public
25 Contracts Law, do you wish to comment on materials that

1 as being so important in the actions that the
2 Freeholders felt they were designing for the benefit of
3 the municipalities and their citizens, that there would
4 have to be a public outreach and public involvement on
5 the issues that affect these municipalities.

6 Now, the Freeholders before your Honor are
7 saying it doesn't apply. Why they mentioned it,
8 they're indirect. Why would they put it there? No
9 response. But now it's claimed in the arguments before
10 your Honor that that interest is remote.

11 I submit to your Honor, the agreement itself
12 says that the interests are not remote. I submit to
13 your Honor that the functions of a county board of
14 freeholders must be the subject of review and
15 supervision of the court as far as the expenditure of
16 funds and municipal action that would have a dramatic
17 affect on citizens of that county and municipalities
18 that now stand before your Honor.

19 THE COURT: Mr. Loughlin, good job and your
20 colleagues should feel good about you being the
21 spokesperson.

22 I will need to ask them if any wish to add.

23 Mr. DeMassi?

24 MR. DE MASSI: The only thing I'd add in
25 terms of E.U.S., I think what's critical here, the

1 court has touched on it to some extent. The contract
2 was signed or executed in May of 2002. In August of
3 2002 was when the Resolution 902-02 was passed by the
4 County Freeholders. That's the resolution I think all
5 of the municipalities relied on because that resolution
6 said, in essence, whatever we have done here we're not
7 going to go forward in each of the municipalities
8 affected.

9 THE COURT: You represent Roselle. You're in
10 Phase Two.

11 MR. DEMASSI: That is correct.

12 THE COURT: That language spoke to three and
13 four.

14 MR. DE MASSI: That's true, it does. It
15 does, but the problem was ---

16 THE COURT: Why is Roselle urging that? How
17 could Roselle tuck itself into that class of the
18 contract?

19 MR. DE MASSI: I think it's all part and
20 parcel of the phases in terms of funding. Roselle at
21 the time this resolution was adopted, the line was not
22 running at that point in time. There's some work being
23 done now. Started during the summer.

24 THE COURT: Roselle was not included as a
25 beneficiary of any public outreach provision, was it?

1 MR. DE MASSI: I believe it was.

2 THE COURT: It was not in Phase Three or
3 Four?

4 MR. DE MASSI: It was in Phase Two, that is
5 correct. But throughout the -- again the contract
6 relates to Phases One, Two, Three and Four, the
7 contract that was signed in August of 2000, sorry in
8 June of 2002. I don't think you can bifurcate, you can
9 bifurcate or what I've segregated into different phases
10 for funding purposes, but you can't really segregate.
11 It's one railroad. It's not going to stop -- build a
12 railroad in Roselle and stop at Roselle. There is no
13 sense building such a railroad. That railroad has to
14 proceed throughout the municipality, and bottom line
15 with every railroad on this resolution which said
16 unless all those municipalities were affected concur
17 this railroad will not be operational. That's what
18 everybody relied on. So I believe that what you, and
19 until June of 2003, I don't believe our cause of action
20 really becomes ripe. Once the resolution of June of
21 2003 is adopted then everyone is aware of the fact now
22 that the county is going to proceed with the railroad.

23 THE COURT: All right.

24 Mr. Osmun?

25 MR. OSMUM: Your Honor I have nothing to say

1 other than that the --

2 THE COURT: You're Phase Four and they
3 haven't even begun to cut brush.

4 MR. OSMUN: Absolutely. We're the last one
5 on the line, your Honor.

6 I'd just add this, your Honor. Seems to me
7 sitting through that argument here, the thrust of our
8 argument is that should Rule 4:69 be relaxed in the
9 interest of justice, and I submit to you, your Honor,
10 this would relate back.

11 I don't know whether it relates back. The
12 question is that contract that was entered into in
13 2002, whether you can go back to one and a half, two
14 years. The DeMargin case in our brief they went back
15 three years, relaxed Rule 4:69 and that's the issue
16 here, particularly in light of the assurances, written
17 and oral from the Board of Freeholders that this line
18 would not be opened. That's the reason why we did
19 nothing. Of course we knew what was going on, we had
20 the assurance of the county that nothing would happen.
21 All of a sudden in June they changed the rules, they
22 amended contracts, as admitted by counsel for the
23 county. They amended by saying we're not going to have
24 this outreach. We didn't know counsel said. We're
25 going to do what we want to do. Seems to me the basic

1 argument here is should your Honor relax the 45 day
2 rule that's under Rule 4:69 and I submit, your Honor,
3 this is a case where your Honor certainly should do so.

4 THE COURT: Miss Estabrook?

5 MS. ESTABROOK: Judge you know I'm something
6 of a neophyte to this case. I don't have any remarks
7 today.

8 THE COURT: Mr. Fruchter?

9 MR. FRUCHTER: Thank you, your Honor.

10 Just briefly. With regard to the activity of
11 the railroad within our respective municipality, that
12 didn't become prevalent until recently. As a matter of
13 fact after the lawsuit was filed, when there was real
14 activity within the Borough of Kenilworth, that's when
15 clearing of brush was done.

16 THE COURT: Look down the line, Mr. Fruchter,
17 you could see it coming, couldn't you?

18 MR. FRUCHTER: You can't see for several
19 miles, Judge, nor is it a requirement to that point.
20 Won't see it in Linden because it is not even a
21 neighboring municipality of ours. No activity in
22 either neighboring municipality at that time and not
23 until after the lawsuit was filed that they actually
24 started clearing with chemicals, sent our residents to
25 the hospital because they inhaled this, because there

1 was no notice.

2 THE COURT: Please don't tell me something
3 now that is not before me in certification form.

4 MR. FRUCHTER: It goes to the notice, Judge.
5 That's what I'm saying. We did not have actual notice
6 of any construction or anything going on within our
7 municipality. These things happened after this
8 lawsuit, after the June date.

9 Thank you, Judge.

10 THE COURT: Mr. Osmun knew more in Summit
11 than you knew in Kenilworth.

12 Any rebuttal?

13 MR. BOOTH: Very briefly. I didn't say we
14 amended the contract at all, I said all it says about
15 outreach is that there would be a schedule of outreach.
16 The clear thrust of the outreach, we assume there's
17 going to be a railroad, let's try and make the best of
18 it. Also, now --

19 THE COURT: But you have that resolution that
20 says something beyond that, does it not, the 2002
21 resolution?

22 MR. BOOTH: Yes. I'm addressing the
23 contract. Just the contract.

24

25

1 THE COURT: Okay.

2 This action comes before the court today upon
3 the defendant's motion to dismiss the amended
4 complaints that have been filed and the consolidated
5 actions by the Borough of Roselle Park, by the Borough
6 of Kenilworth, by the City of Summit, the Borough of
7 Roselle, the Township of Springfield. It's somewhat
8 curious and interesting to note that the City of
9 Linden, the Township of Cranford, and the Township of
10 Union are not participating in these proceedings, all
11 of which are directly involved and connected with the
12 subject rail line.

13 The motion seeks dismissal before the
14 defendants are required to file an answer to the
15 plaintiffs' pleadings.

16 The railroad's motion for that dismissal, if
17 I may now refer to the Morris and Erie Railroad in that
18 fashion, is premised upon preemption grounds. The
19 Union County motion is premised upon more narrow and
20 technical grounds.

21 Before I get to either, I need to initially
22 make some determinations as to the nature of the causes
23 of action that are being urged, and for that reason I
24 inquired initially as to what writ in the prerogative
25 writ jurisdiction was being invoked.

1 The only prerogative writ that would come
2 into play in a proceeding of this nature would be the
3 writ of mandamus, which brings up for review action
4 taken by a local governmental body and generally does
5 so by presenting to a court a record so that the court
6 can evaluate whether that action taken by local
7 government, as informed by that record, was arbitrary,
8 capricious or unreasonable.

9 That is not within these pleadings. These
10 pleadings are much narrower and issue specific. The
11 plaintiffs recognize that by filing these actions, as
12 the first was filed by Roselle Park in July, they must
13 meet the 45 day provision of the prerogative writ rule.
14 Measured against the Freeholder Board June meeting, the
15 rule is satisfied. The pleadings were filed within 45
16 days thereafter, and I have no difficulty then in
17 allowing the other municipalities to join in as they
18 have done.

19 What then is challenged initially is a
20 resolution of the Freeholders that rescinded action
21 taken by another resolution of that board a year or so
22 earlier.

23 The county operates under the optional county
24 charter law and the provisions generally applicable to
25 all counties set forth in Title 40, and specifically in

1 Title 40:41A-27, the enumeration of general powers,
2 Section B. Counties are authorized to adopt, amend,
3 enforce and repeal ordinances and resolutions and
4 rescind same. So I start out with the county by its
5 legislative empowerment having the power to rescind
6 that which it did at an earlier time and, indeed, no
7 one in terms of the basic exercise of that appellate
8 power has urged that the Freeholder Board lacks the
9 ability to do that, that the Board was bound by the
10 terms and provisions of the '02 resolution and could
11 not rescind that.

12 That is fundamental when you look to the 45
13 day provision now under the rule. Because all that is
14 within the pleadings addresses action taken at an
15 earlier time, and without the ability to read the rule
16 expansively and allow relation back to occur, you're up
17 against an exercise of a power that has been granted to
18 county government, to wit, the power to rescind that
19 which it did at an earlier time. And the argument that
20 there should be relation back is bottomed on an
21 assertion that the public interest of the affected
22 municipalities is so strong that there should be an
23 examination of the action taken by the Freeholder Board
24 at these earlier times. I'd dare say all the way back
25 to the acceptance of the grant from the state and the

1 Department of Transportation, and then the negotiations
2 of and approval of the contract with the railroad.

3 To get that far back in this context brings
4 up as the issue, was it arbitrary or capricious or
5 unreasonable for the Board in June of '03 to make a
6 decision to rescind that which it had recorded in its
7 '02 resolution. The municipalities urged they relied
8 upon the provisional language of that resolution, that
9 there would be some form of municipal involvement and
10 participation. It doesn't find itself within the
11 contract itself. The contract itself is an operational
12 agreement between the County and railroad and I think
13 its basic provisions are informed by the section that
14 deals with material breach.

15 There is nothing found within that section to
16 suggest even remotely that there is some beneficiary
17 status being conferred upon those municipalities
18 through the language. The only language that can be
19 pointed to is that which deals with public outreach.
20 One, by its own terms it speaks to Phases Three and
21 Four and not more, and two, it says that a timetable
22 will be established to develop a dialogue with the
23 affected communities and develop the most efficient
24 plan to maximize the benefits of the project. In other
25 words, the project goes forward, but because it will

1 have that effect, both benefit and effect there is to
2 be dialogue. That language cannot be stretched to
3 reach a requirement of third-party beneficiary status
4 being conferred upon those municipalities. Within the
5 agreement that is so secondary and incidental that it
6 just fails utterly to meet what is required in law for
7 conferring third-party beneficiary status.

8 Now, having said that, what's left of
9 relation back in terms of the public interest being
10 urged? A couple other factors. The Freeholder Board
11 since the inception of this project has acted in public
12 and, as demonstrated, without contradiction and without
13 factual question taken action on any number of
14 occasions clearly setting forth its public purpose of
15 reactivating this rail line and beginning all that is
16 necessary in such activation to put it into operation.

17 The acceptance of the grants, the acceptance
18 from the Department of Transportation to become the
19 local implementation agency for this line, the
20 negotiation with -- first the authorization to
21 negotiate with the railroad company, the negotiations
22 and then the separate approval of the contract, the
23 operating agreement and within that, the process by
24 which the railway was accepted as the contracting party
25 and utilization under the Local Public Contracts Law of

1 the E.U.S. provision, all done in public, all done
2 starting in 2000, 2001, 2002.

3 Mr. Fuller's certification tells us without
4 surprise that considerable monies have been expended
5 now by the railroad in furtherance of that agreement,
6 and finally, the rail line is seeking and obtaining a
7 modification of the certificate from the federal
8 regulatory authority.

9 The only exception for the 45 day provision
10 is here, one that would be under the public interest.
11 If I balance all of the factors I have now pointed to,
12 and particularly the continual conduct and activity on
13 the county freeholder board level, moving the project
14 forward step by step by step over more than two years
15 time, the policy enunciated by the state in its
16 acquisition of these two dormant lines, its expenditure
17 of significant monies to do so and then to engage the
18 County as the authority or public representative for
19 this line, the approval from the federal regulatory
20 authority, and finally, the obvious fiscal activity
21 taking place to implement all of this, diminishes in
22 large measure the asserted right of the municipalities
23 because in the final analysis what is that right?

24 Ridgefield Park tells us it is a very
25 circumscribed, limited right. There is complete

1 preemption as to all operational features of the line,
2 and all of the preparatory work for that. Ridgefield
3 Park says there may be public health and safety
4 regulations that still reposes within an affected
5 municipality, and I'd suggest any reading of Ridgefield
6 Park says to a municipality that's about all our
7 Supreme Court can find that remains for your interest.

8 Well, relation back has nothing to do with
9 that. That's still there. That may be exercised if
10 there's an appropriate basis for doing so. So the
11 public interest then is an interest that runs smack up
12 against the preemption doctrine because it has to deal
13 with other issues, issues that do not repose within a
14 state forum, issues that cannot be addressed by a state
15 court.

16 I'm not persuaded that there should be
17 relation back. I'm not persuaded that there is
18 anything within the amended pleadings dealing with the
19 actions of the County Freeholder Board in awarding the
20 contract or in the selection of the railroad that at
21 this late date survives and should be subject to Law
22 Division review.

23 We're left then with was there a violation of
24 the Open Public Meetings Act on the 23rd of June when
25 the Freeholder Board passed the resolution?

1 MR. FIORILLA: 5th, Judge.

2 THE COURT: You're right, the 5th of June,
3 that survivors a motion to dismiss. Because the minute
4 I get beyond the bare allegation, I'm into a factual
5 question, and that's met with the request there be
6 discovery, and the plaintiffs are entitled to that.

7 That's all I can find here that survives the
8 motion. I do not get into Local Public Contracts
9 because I can only do that if I first find relation
10 back is appropriate, and I have been unable to so find.
11 I do not get into any of the financing issues because,
12 one, the separate resolution as to the budget is not
13 under attack in any of these pleadings, and two, all
14 other financial aspects are subject to the same
15 relation back.

16 I don't know what to do with the alleged
17 conflict of interest other than simply to say that if
18 the plaintiffs chose to pursue it, I cannot deny them
19 the opportunity to do so. I don't think I can, in
20 other words, get beyond that pleading today and engage
21 in any factual -- the lack of the traffic study, lack
22 of environmental impact study falls simply because
23 there is no relation back available to the plaintiffs.

24 The impossibility of the performance. Well,
25 these plaintiffs aren't performers, in a nutshell. You

1 THE COURT: Yes, I'm sorry, I did. Yes, I
2 can't do that today.

3
4 C E R T I F I C A T I O N

5
6 I, Frederick D. Wolff, III, C.S.R., License
7 No. XI00369, an Official Court Reporter in and for the
8 State of New Jersey, do hereby certify the foregoing to
9 be prepared in full compliance with the current
10 Transcript Format for Judicial Proceedings and is a
11 true and accurate non-compressed transcript, to the
12 best of my ability.

13
14
15 _____ March 17, 2004
16 FREDERICK D. WOLFF, III, C.S.R. Date
17 Official Court Reporter
Union County Courthouse
Elizabeth, New Jersey